Supreme Court, U.S.
FILED
DEC 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-581 (3)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

DAVID BULLOCH, *et al.*,
Petitioners,

v.

PAUL B. PEARSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF SCOTT M. MATHESON AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

SCOTT M. MATHESON
185 South State Street, Suite 700
Salt Lake City, Utah 84111
(801) 532-1234

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-581

DAVID BULLOCH, *et al.*,
Petitioners,

v.

PAUL B. PEARSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, I move for leave to file the accompanying Brief in this case as an *amicus curiae.*

Petitioners, through their counsel, have consented to the filing of the accompanying Brief. Petitioners' written consent is filed simultaneously with this motion with the Clerk of the Court. However, Respondents, through the Solicitor General, have refused to consent.

I served as Governor of Utah from 1977 to 1985. I have been a lifelong Utah resident. My interest in this

case, which is set forth more fully in my Brief, is two-fold.

First, the federal government's open-air atomic testing program that began in Nevada in 1951 sprayed nuclear radiation fallout over an area of southern Utah that many of my relatives and I call home. During part of the testing program, I lived in Cedar City, Iron County, Utah, and believed, along with my relatives and neighbors, the Atomic Energy Commission's pronouncements to those who lived close to the testing site that "there is no danger." I have no doubt today that we were misled.

Second, as Governor of Utah, I devoted much of my time and energy to the radiation fallout question. After expressing my concern in 1978 to the Secretary of Health, Education, and Welfare and the President of the United States, the State of Utah succeeded in obtaining thousands of previously concealed documents from government archives, and in having studies on the health effects of the nuclear testing program re-opened and re-evaluated. Those efforts produced a record showing that, at the very least, the federal government for over twenty years placed citizens of Utah at risk without their knowledge, without their consent, and without taking proper precautions.

As an *amicus curiae* in this case, I think that I can provide an important perspective on the wisdom of the liberal federal court pleading standards embodied in Rule 8 of the Federal Rules of Civil Procedure and this Court's decisions. If the concerns I expressed as Governor had been summarily dismissed, the record that was developed on the effects of atmospheric nuclear testing still would be concealed. If the Petitioners can develop a record under their complaint that will support their claims of constitutional deprivation without offending the doctrine of collateral estoppel, then their complaint should be evaluated by the court below on the merits, and, if the complaint is found to be legally sufficient, the case should proceed to discovery.

I wish to expand on these points in my Brief. Accordingly, for the foregoing reasons, I request that this motion be granted.

DATED THIS 5th day of December, 1985.

Respectfully submitted,

SCOTT M. MATHESON
185 South State Street
Salt Lake City, Utah 84147
Amicus Curiae *

* Also a member of the Bar of this Court.

QUESTION PRESENTED

Did the court below err in affirming the dismissal of the complaint on the basis of collateral estoppel in view of the liberal pleading standards embodied in the Federal Rules of Civil Procedure?

TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
REASONS FOR GRANTING THE PETITION	4
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:

Bulloch v. United States, 763 F.2d 1115 (10th Cir. 1985) 4
Conley v. Gibson, 355 U.S. 41 (1957) 5
Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976) 5-6

Federal Rules of Civil Procedure:

Rule 8 5
Rule 60(b) 4

Other Authorities:

F. James and G. Hazard, *Civil Procedure* (3d ed. 1985) 5-6
5 C. Wright and A. Miller, *Federal Practice and Procedure* (1969) 5
I *Health Effects of Low-Level Radiation, 1979: Joint Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce and the Subcommittee on Health and Scientific Research of the Senate Committee on Labor and Human Resources and the Senate Committee on the Judiciary*, 96th Cong., 1st Sess. (1979) 2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-5[illegible]1

DAVID BULLOCH, *et al.*,
Petitioners,

v.

PAUL B. PEARSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF SCOTT M. MATHESON AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, I, Scott M. Matheson, as *amicus curiae*, file this Brief in support of the Petition for Writ of Certiorari that was filed on October 2, 1985.

INTEREST OF *AMICUS CURIAE*

I am a lifetime resident of Utah. From 1977 to 1985, I was Governor of Utah. My interest in this case stems from a personal and family history deeply touched by the federal government's atmospheric nuclear testing that commenced in southeast Nevada in 1951. My interest

also arises from the central role that I played as Governor of Utah in the radioactive fallout issue.

My ancestors were the first settlers in Iron County, Utah, which was downwind from the Nevada nuclear test site. I spent much of my youth in this area, and, in 1952, I started my legal career in Cedar City, Utah. Later, as Governor, I recalled this time in my testimony before a joint congressional hearing:

> At that time and in the years that followed, an all-out public relations campaign was mounted by the Atomic Energy Commission to assure those who lived close to the test site that "there is no danger."
>
> That quote was used widely in radio announcements, particularly in the southern communities of Utah, on each day following the actual bomb blasts. Although, on occasion, residents were advised to remain indoors for an hour or two, the AEC announcements were quick to remind the listeners that "there is no danger." [1]

As I testified later in the same proceeding:

> I also lived down in Iron County during the atomic testing and also went outside of the house and watched the mushroom. So, I can assure you that it happened. I saw it, and I was given no warning.[2]

As the years progressed, and the death rate from leukemia in southern Utah grew disproportionately large, concern over the health effects of the nuclear testing continued to mount. In 1978, I took those concerns as Gover-

---

[1] I *Health Effects of Low-Level Radiation, 1979: Joint Hearing Before the Subcommittee on Oversight and Investgiation of the House Committee on Interstate and Foreign Commerce and the Subcommittee on Health and Scientific Research of the Senate Committee on Labor and Human Resources and the Senate Committee on the Judiciary*, 96th Cong., 1st Sess. 16 (1979) (Statement of Honorable Scott M. Matheson, Governor, State of Utah) (hereinafter "Radiation Hearings").

[2] *Id.* at 68.

nor of Utah to the Secretary of the Department of Health, Education and Welfare and to the President of the United States. I also filed Freedom of Information Act requests with several federal departments and agencies and retrieved documents from state archive files.

These efforts, along with those of many federal officials and congressional leaders, unearthed voluminous information and forced the government to re-open and re-evalute studies on the health effects of nuclear radiation fallout. Moreover, as the previously concealed information was reviewed and synthesized, it became evident that the federal government had been less than forthcoming. Upon turning over hundreds of key documents to the congressional committees investigating this matter, I pointed out that in the 1950's

> Utahns readily accepted the idea that atomic testing was essential for national security purposes and that they would suffer no harmful effects because of the testing. They believed the Atomic Energy Commission and its extensive public relations campaign.
>
> Today (1979) Utahns are not nearly so accepting. They now have doubts and questions about the harmful health effects of which they may have been the unwitting recipients.[3]

Indeed, I concluded that "there has been a serious failure by the federal government to deal responsibly and candidly with the human health consequences of the fallout." [4]

---

[3] *Id.* at 16.

[4] *Id.* at 17. I testified further,

> [T]he evidence shows a willful refusal to investigate threats to human health. It also shows a conscious suppression of important information on health dangers. The primary responsibility appears to rest with the AEC, although others aided and abetted that agency. The reasons for this incredibly irresponsible course of conduct appears to have been all too human and all too petty. *Id.* at 18.

This discovery process revealed misconduct of federal officials relating to the mass carnage of sheep and lambs that were grazing downwind from the Nevada test site in 1953. Indeed, the resurrection of *Bulloch v. United States* and the commencement of this case are in large part the product of those efforts to obtain full disclosure from the federal government.

As a member of the Bar of this Court and for the foregoing reasons, I feel compelled to speak on behalf of the Petitioners whose sheep and lambs died after being exposed to radiation from the tests. I believe that they are victims of nuclear radiation and government misconduct.

REASONS FOR GRANTING THE PETITION

Although my interest in this case is genuine and deep, the views expressed here are appropriately limited. The reasons expressed above for my interest as an *amicus* underlie the perspective I offer on the procedural issue in this case.

The court below affirmed the trial court's dismissal of Petitioners' complaint. The district court concluded that the complaint failed to state a claim upon which relief can be granted. The court of appeals, however, did not review the district court's rationale but instead affirmed on an entirely different ground—collateral estoppel, a basis for decision not considered by the district court.

The court below reasoned that its decision in *Bulloch v. United States*, 763 F.2d 1115 (10th Cir. 1985), petn. for cert. pending, No. 85-472 (filed Sept. 18, 1985), which reversed a district court order that granted Petitioners' Rule 60(b), Fed. R. Civ. P., motion and awarded a new trial based on a finding of government fraud on the court, precluded Petitioners from litigating the instant case. The court of appeals concluded that because Petitioners' instant case is based on government fraud upon the court, the *Bulloch v. United States* ruling bars them from proceeding. The Petitioners, however, contend that

their complaint goes beyond the fraud on the court theory that was the basis for their Rule 60(b) motion in *Bulloch v. United States.*[5]

Specific construction of the complaint in light of collateral estoppel principles is appropriately left to the parties for briefing and argument. I offer the following general observations.

Rule 8(a)(2), Fed. R. Civ. P., calls for "a short and plain statement of the claim," and Rule 8(f) requires that the complaint "be so construed as to do substantial justice." The Supreme Court declared in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that a pleading is sufficient unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his cause which would entitle him to relief." Unless Petitioners' complaint fails this exceedingly liberal test, this case should proceed to discovery. Indeed, a limited first phase of discovery would provide a much sounder basis to decide the collateral estoppel issue than simply the four corners of a 175-paragraph complaint.[6]

Further, the simplified pleading permitted by the Federal Rules contemplates allowing pleaders to go forward into the discovery stage to avoid the risk of deciding cases on pleading technicalities and to ascertain precisely how they were wronged.[7] As this Court said in *Hospital*

---

[5] I realize, of course, that if this Court grants review and agrees with this contention of the Petitioners, the district court's decision that the complaint does not state a legally cognizable claim still remains for appellate review.

[6] At the very least, Petitioners should have been afforded leave to amend their complaint, to overcome the lower court's collateral estoppel concerns. *See* 5 C. Wright and A. Miller, *Federal Practice and Procedure*, § 1357 at 611-14 (1969).

[7] *See* F. James and G. Hazard, *Civil Procedure* 153 (3d ed. 1985). It is well settled that "[f]or purposes of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff

Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746 (1976), "where the 'proof is largely in the hands of the alleged conspirators,' . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly."

The southern Utah nuclear radiation fallout experience has been, in large part, a generation's struggle to disgorge information exclusively in the hands of a secretive, defensive, and evasive government. Had federal officials rebuffed our discovery efforts in the late 1970's, we would have been much further from the truth than we are today.

I do not wish to strain the analogy, but I believe that recent experience on the fallout issue in Utah highlights the wisdom of the simplified federal pleading rule for cases such as this one. We felt the citizens of Utah had a legitimate grievance and a right to know what their government had done to them. Only discovery of pertinent information began to answer this concern, and it revealed a pattern of government suppression of information.

The result-oriented opinion and ruling of the court below reflect that short shrift was given to the liberal pleading standards embodied in the Federal Rules and this Court's decisions. I submit this Brief to put the matter at issue in a context that underscores the wisdom of the federal pleading policy and the lower court's failure to heed it.

---

and its allegations are taken as true." 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1357 at 594 (1969).

CONCLUSION

The Petition for a Writ of Certiorari should be granted. Alternatively, the Court should hold this Petition pending disposition of the related Petition in *Bulloch v. United States*, No. 85-472 (filed September 19, 1985).

Respectfully submitted,

SCOTT M. MATHESON
185 South State Street, Suite 700
Salt Lake City, Utah 84111
(801) 532-1234
Amicus Curiae

December 5, 1985.